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No. 85-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EXXON CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED

In what appears to be the largest money judgment ever entered against a private defendant in American history, Exxon Corporation has been summarily adjudicated liable for two billion dollars for supposed violations of price control regulations with respect to crude oil. The question presented is whether this exaction, based on an extraordinary patchwork of retroactive and discriminatory regulatory interpretations, deprives Exxon of property without due process of law and in violation of the central canons of fairness in administrative law laid down by this Court. More particularly, the questions presented are:

1. Whether it is lawful, under the Constitution and laws of the United States, for a firm to be held liable for two billion dollars on the basis of an interpretation of a price control regulation that the administering agency itself has repudiated as inimical to the purposes of the regulatory scheme?

2. Whether it is lawful for a firm to be subjected to such a liability on the basis of a regulation, itself couched in general and prospective terms, which has been interpreted without reasoned explanation so that (a) some persons are subjected to its burdens retroactively but are denied its benefits altogether while (b) similarly situated persons escape retroactive application of its burdens and yet enjoy its benefits to the full?

3. Whether it is lawful for an agency to ignore its own rule providing that the application of a harsh retroactive regulatory standard will be mitigated by permitting persons on a case-by-case basis to establish a reasonable alternative date for compliance, and for the courts then to refuse to conduct any comparable judicial hearing?

4. Whether, in administering a statutory remedy providing only for "restitution of moneys received," the lower courts may, without any attempt to balance equities, simply order a defendant to pay, with substantial prejudgment interest, amounts that it did not receive to persons who did not suffer harm?

PARTIES TO THE PROCEEDING

In addition to Exxon Corporation * and the United States, the following persons were parties to the proceeding in the court of appeals:

Air Transport Association of America
American Petroleum Refiners Association
Anthony Monaco t/a Milltown Exxon Servicenter
Ashland Oil, Inc.
Champlin Petroleum Company
Commonwealth of Pennsylvania
Commonwealth of Puerto Rico
Commonwealth of Virginia
Consumers Power Group
District of Columbia
Donald E. Skilling t/a Edon Service Corp.
Edward McGovern t/a Maple Avenue Exxon
Geraldine H. Sweeney
Luther Griffin t/a Palmer Highway Exxon
Marathon Petroleum Company
Mississippi Department of Energy and Transportation
Mobil Oil Corporation
Murphy Oil Corporation
National Freight, Inc.
National Oil Jobbers Council
Pennzoil Company
Philadelphia Electric Company
RJG Cab, Inc.
Rex Shipley t/a Shipley's Standard Service
State of Alabama
State of Arkansas
State of California
State of Colorado
State of Delaware
State of Hawaii
State of Idaho

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* Exxon's affiliates and partially owned subsidiaries are listed at App. K, *infra*.

State of Illinois
State of Indiana
State of Iowa
State of Kansas
State of Louisiana
State of Michigan
State of Minnesota
State of Nebraska
State of Nevada
State of New Jersey
State of New Mexico
State of New York
State of North Carolina
State of North Dakota
State of Ohio
State of Oregon
State of Rhode Island
State of Tennessee
State of Texas
State of West Virginia
State of Wisconsin
Tenneco Oil Company
Territory of Guam
Territory of the Virgin Islands
Texas City Refining, Inc.
Tosco Corporation

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED	2
STATEMENT	2
1. Introduction	2
2. Events leading to formation of the Hawkins Field unit on January 1, 1975	3
3. Regulatory developments subsequent to unitization	8
a. In August, 1975, FEA retroactively rules that lease-by-lease accounting must be abandoned and a unit BPCL adopted immediately upon unitization, even though it earlier had privately advised that lease-by-lease accounting continued to be appropriate after unitization	8
b. In February, 1976, FEA rescinds its earlier ruling *ab initio* and rules that lease-by-lease accounting may be continued until the occurrence of a "significant alteration in producing patterns"	9
c. In May, 1976, FEA determines that continued lease-by-lease accounting at Hawkins Field is proper under the standard of "significant alteration in producing patterns"	11
d. In August, 1976, FEA defines "significant alteration in producing patterns" as either the injection of gas or an increase in allowables (regardless whether producing patterns actually had changed) but grants to unitized fields the ameliorative benefit of "imputed new oil"	12

TABLE OF CONTENTS—Continued

Page

e. In January, 1977, FEA announces that

(1) the standard of "significant alteration in producing patterns" will be applied only as of September 1, 1976, to units formed on or after February 1, 1976, but will be applied retroactively, with the August, 1976, definition being used "as guidance," to units formed before February 1, 1976,

(2) the benefit of "imputed new oil" will be denied to all units required to adopt a unit BPCL before September 1, 1976, but

(3) operators of units formed before February 1, 1976, will be afforded an opportunity, on a case-by-case basis, to establish a reasonable alternative date for adopting a unit BPCL 13

f. In January, 1978, DOE takes the position that a unit BPCL should have been adopted at Hawkins Field by June, 1975 15

4. The district court's opinion 16

a. The district court applies the August, 1976, definition as a binding legal rule and holds that it required adoption of a unit BPCL at Hawkins Field on January 1, 1975 16

b. The court approves both the selectively retroactive application of the August, 1976, definition and the denial to Exxon of the benefit of "imputed new oil" 17

c. The court refuses to consider the question of a reasonable alternative date for adopting a unit BPCL 19

d. Under a statute that allows only "restitution of moneys received," the court orders Exxon to pay, with prejudgment interest, amounts that it never received to persons who suffered no harm 19

TABLE OF CONTENTS—Continued

Page

5. TECA's opinion 20

a. TECA holds that the definition of "property" in 10 C.F.R. § 212.72 required adoption of a unit BPCL immediately upon unitization in every case, notwithstanding FEA's explicit determination to the contrary when it rescinded Ruling 1975-15 *ab initio* 20

b. TECA holds in the alternative that the district court was correct in applying the August, 1976, definition and in denying the benefit of "imputed new oil" 21

c. TECA "affirms" a purported holding by the district court that Exxon had failed to establish a reasonable alternative date 22

d. TECA upholds the imposition of liability for "overcharges" committed by other interest owners, the award of excessive prejudgment interest, and the selection of the several States as the recipients of "restitution" 23

REASONS FOR GRANTING THE PETITION 24

1. TECA fundamentally erred in adopting a construction of 10 C.F.R. § 212.72 that had been repudiated by the agency as substantively invalid.. 27

2. TECA's retroactive and discriminatory application of 10 C.F.R. § 212.75 violates three important principles of administrative due process established by the decisions of this Court 29

a. TECA's interpretation of the new regulatory definition as having retroactive effect violates this Court's "first rule of construction" 29

b. TECA's retroactive application of the August, 1976, definition violates established principles of due process 30

TABLE OF CONTENTS—Continued

Page

c. TECA's selective application of § 212.75 violates this Court's teaching concerning the invalidity of arbitrary and discriminatory classifications 32

3. TECA not only approved but participated in a violation of the *Accardi* doctrine 35

4. TECA erroneously construed and applied section 209 of the ESA in a manner that destroys its essential character as an equitable remedy 38

CONCLUSION 42

TABLE OF AUTHORITIES

CASES Page

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) .. 26
Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co., 284 U.S. 370 (1932) 31
Atlantic Coast Line Railroad Co. v. Florida, 295 U.S. 301 (1935) 39-40
Atlantic Richfield Co., 5 DOE ¶ 82,521 (1980) 7
Binney v. Long, 299 U.S. 280 (1936) 34
Blau v. Lehman, 368 U.S. 403 (1962) 41
Board of County Commissioners v. United States, 308 U.S. 343 (1939) 41
Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) 29
Central Illinois Public Service Co. v. United States, 435 U.S. 21 (1978) 31
Empire Drilling Co., 2 FEA ¶ 83,142, *aff'd*, 2 FEA ¶ 80,676 (1975) 9, 28
Exxon Corp. v. United States, 616 F.2d 526 (TECA 1980) 1
Exxon Corp. v. United States, 655 F.2d 1112 (TECA 1981) 1
Forbes Pioneer Boat Line v. Board of Commissioners, 258 U.S. 338 (1922) 31-32
Greene v. United States, 376 U.S. 149 (1964) 30
Hecht Co. v. Bowles, 321 U.S. 321 (1944) 40
Heckler v. Community Health Services, Inc., 104 S. Ct. 2218 (1984) 31
Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973) 25
INS v. Chadha, 462 U.S. 919 (1983) 39
Lewellyn v. Frick, 268 U.S. 238 (1925) 30
MGHC, Inc., 10 DOE ¶ 83,021 (1983) 20
Miller v. United States, 294 U.S. 435 (1983) 30
Morton v. Ruiz, 415 U.S. 199 (1974) 36
Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983) 32, 33, 35
Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 104 S. Ct. 2709 (1984) 32

TABLE OF AUTHORITIES—Continued

	Page
Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330 (1935)	32
Rodgers v. United States, 332 U.S. 371 (1947)	41
Securities and Exchange Commission v. Chenery, 332 U.S. 194 (1947)	25
Securities and Exchange Commission v. United States Realty & Improvement Co., 310 U.S. 434 (1940)	40
Securities Industry Association v. Board of Governors of Federal Reserve System, 104 S. Ct. 2979 (1984)	28
Standard Oil Co. v. Federal Energy Administration, 453 F. Supp. 203 (N.D. Ohio), *aff'd sub nom. Standard Oil Co. v. Department of Energy*, 596 F.2d 1029 (TECA 1978)	7
Sun Oil Co., 2 FEA ¶ 83,075 (1975)	9, 28
Texas Pacific Oil Co., 12 DOE ¶ 83,020 (1984)	20
Thompson v. Louisville, 362 U.S. 199 (1960)	25
United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954)	36
United States v. Exxon Corp., 470 F. Supp. 674 (D.D.C. 1979)	1
United States v. Exxon Corp., 94 F.R.D. 252 (D.D.C. 1981)	1
United States v. Exxon Corp., 561 F. Supp. 816 (D.D.C. 1983)	1
United States v. Larionoff, 431 U.S. 864 (1977)	29
Williams v. Vermont, 105 S. Ct. 2465 (1985)	34
Windsor v. McVeigh, 93 U.S. 274 (1876)	37
Yellin v. United States, 374 U.S. 109 (1963)	36

STATUTES

Administrative Procedure Act, 5 U.S.C. § 552(a)(1) (1982)	7
Administrative Procedure Act, § 10(e), 5 U.S.C. § 706 (1982)	2
Administrative Procedure Act, 5 U.S.C. § 706(2) (1982)	32

TABLE OF AUTHORITIES—Continued

Page

Economic Stabilization Act of 1970, *as amended*, 12 U.S.C.A. § 1904 note (1980)

Section 209 ..... 2, 16, 23, 38
Section 211(a) 16
Section 211(g) 1

Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, § 5(a)(1), 87 Stat. 627 (1973) 1-2, 16

Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871, 15 U.S.C. § 757(b)(2) 34

LEGISLATIVE MATERIALS

121 Cong. Rec. 23,983 (1975) 39

Hearings on Crude Oil Pricing Compliance Problems Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess. 103 (1976) 15

CODE OF FEDERAL REGULATIONS

10 C.F.R. § 211.66 (1981) 19
10 C.F.R. § 212.72 (1975) ..... *passim*
10 C.F.R. § 212.75 (1977) ..... *passim*
10 C.F.R. § 212.75(b), (d) (1977) 12
10 C.F.R. § 212.78(c) (1979) 11

FEDERAL REGISTER

40 Fed. Reg. 30030 (1975) 39
41 Fed. Reg. 1564 (1976) 5, 9
41 Fed. Reg. 4931 (1976) 10, 11, 18, 28, 33
41 Fed. Reg. 36172 (1976) 12, 13, 29, 35
42 Fed. Reg. 3628 (1977) 27
42 Fed. Reg. 4409 (1977) ..... *passim*

ADMINISTRATIVE RULINGS

Ruling 1975-15, 40 Fed. Reg. 40832 (1975) ..... *passim*
Ruling 1977-2, 42 Fed. Reg. 4409 (1977) ..... *passim*

TABLE OF AUTHORITIES—Continued

OTHER MATERIALS

	Page
American Bar Association, Administrative Law Section, *Recommendations and Report to the House of Delegates, American Bar Association: Report on Appellate Review for Emergency Programs* 11 (1984)	27
Burke, *Report to ABA Economic and Resources Controls Committee on Economic Stabilization Program Litigation*, 32 Bus. Law. 1259 (1977)	27
Elkins, *The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility*, 1978 Duke L. J. 113	27
Fed. R. Civ. P. 56	26
Williams & Myers, *Manual of Oil and Gas Terms* (1982)	3

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v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Exxon Corporation ("Exxon") hereby petitions for a writ of certiorari to the Temporary Emergency Court of Appeals of the United States ("TECA") to review a judgment against Exxon in the amount of $2,011,014,887.25, including interest through August 31, 1985.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is not yet reported.[1] The opinion of the district court (App. B) is reported at 561 F. Supp. 816.[2]

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1985. A timely petition for rehearing was denied on August 15, 1985 (App. C). This Court's jurisdiction is invoked under section 211(g) of the Economic Stabilization Act of 1970, *as amended*, 12 U.S.C.A. § 1904 note (1980), as incorporated by section 5(a)(1) of the Emer-

[1] "App." refers to the separately bound appendix that accompanies this petition.

[2] Interlocutory opinions of the court of appeals are reported at 655 F.2d 1112 (App. E) and 616 F.2d 526 (App. H). Interlocutory opinions of the district court are reported at 94 F.R.D. 252 (App. D) and 470 F. Supp. 674 (App. I). Two other interlocutory opinions of the district court (App. F and App. G) are not reported.

gency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627, 633.

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution of the United States in pertinent part provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The pertinent provisions of section 209 of the Economic Stabilization Act of 1970, *as amended*, 12 U.S.C.A. § 1904 note (1980), of section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706 (1982), and of 10 C.F.R. §§ 212.72 and 212.75 are set forth at App. J.

STATEMENT

1. *Introduction.* The enhancement of domestic crude oil production was a central objective of national energy policy in the early 1970's. This case arises out of Exxon's effort to further that policy by implementing an enhanced recovery project to reverse the natural decline in production at Hawkins Field, one of the largest oil fields in the United States. The project cost more than $220 million and will result in the recovery of an incremental 70 million barrels of crude oil. Exxon now has been told that this effort triggered an unanticipated obligation to reduce the price of oil produced from the field to a level that left Exxon far worse off than if it had simply done nothing. As its reward for increasing domestic production, Exxon has been held liable for more than two billion dollars.

The lower courts imposed this staggering liability—the largest such money judgment in American legal history—without a proper basis in law. Exxon has been singled out for liability on the basis of an incoherent patchwork of discriminatorily selected bits and pieces of administrative regulations (some formally repudiated by the agency and nevertheless enforced by the courts; some concocted by picking and choosing only the harsh and ignoring the mitigating features of the very same regulation; some

construed to create bizarre and irrational distinctions among regulated enterprises; all invented after the fact and retroactively applied). This was done, moreover, without any semblance of either an administrative hearing or a court trial at which Exxon would have had an opportunity to make the factual showing called for by the agency's own rules.

To cap it all off, the courts held Exxon liable for the supposed overpricing not only of crude oil it produced itself but also of oil produced and sold by others; they charged Exxon interest for the use of hundreds of millions of dollars that it never received; and they awarded "restitution" to the several States because they were unwilling to determine who, if anyone, actually had been injured.

2. *Events leading to formation of the Hawkins Field unit on January 1, 1975.* The Hawkins Field, located in eastern Texas, covers more than 300 leases and is one of the largest oil fields in the continental United States. R. 23395, 29742-43, 27982-83.[3] Exxon owns working interests in roughly two-thirds of the field's crude oil production. R. 27993. Rights to the remaining production are held by approximately 300 working interest and 2,200 royalty interest owners. R. 27991, 29743.[4]

By the 1960s, a serious decline in reservoir pressure at Hawkins Field was causing the irrecoverable loss of crude oil underground. R. 27985-88. The decline in pressure could be slowed somewhat by recycling the field's production of natural gas back into the reservoir. *E.g.*, R. 27988, 10461-63. But the decline could be ended or reversed only by instituting an "enhanced recovery" project involving manufacture and injection into the reservoir

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[3] "R." refers to the record on appeal.

[4] In a typical oil and gas lease, the landowner retains a 1/8 "royalty interest" in production and conveys a 7/8 "working interest" to the mineral lessee. *See* WILLIAMS & MYERS, MANUAL OF OIL AND GAS TERMS, 838-39 (1982).

of massive quantities of inert gas. *E.g.*, R. 27988, 9866-72.

An interim recycling project was undertaken at Hawkins Field beginning in 1969. R. 27988, 23785. But an enhanced recovery project could not be undertaken until the interest owners entered into a "unit agreement" under which operating costs and ownership of production would be shared on a field-wide basis. R. 27990-91. Such an agreement was necessary both because of the costs involved—the equipment investment costs were about $102 million, and through 1981 the operating and maintenance costs of unitized operations were about $120 million, R. 27992—and because the injection of massive quantities of inert gas, unlike the mere recyclying of natural gas, forces movement of crude oil underground across lease lines and thus affects the relative amount of oil that can be recovered from each lease. R. 10113-14, 11640.

The interest owners met in 1971 to discuss the need for unitization and enhanced recovery. App. 185a. Protracted negotiations followed. *E.g.*, R. 16175-78, 14641-44. While these negotiations were in progress, the federal government imposed so-called "two-tier" price controls on crude oil:

> Producers were required to sell "old" crude oil at the lower-tier price and were allowed to sell "new" crude oil at a higher price. Amounts of "old" and "new" oil were calculated by comparing current production at a given property to that property's production in [the] corresponding [month of 1972], its "base production control level" ("BPCL"). Any excess of current production above the BPCL could be sold as higher-priced new oil. All current production up to the BPCL, however, had to be sold as lower-priced old oil. . . . "Property" was defined as "the right which arises from a lease or from a fee interest to produce domestic crude petroleum."

App. 175a-177a (footnotes and citations omitted).

By 1974, approximately 34 percent of the production at Hawkins Field constituted "new oil" qualifying for

the higher "new oil" price under these two-tier controls. R. 29743, 31482-83. Over time, in the absence of unitization and enhanced recovery, a substantial portion of the field's production would have continued to qualify for the higher new oil price. R. 31495, 31479-80.[5] If price controls were to apply to the field in the same manner before and after unitization, with production from each lease being compared with the BPCL for that lease, then a large share of total production would, as before, qualify for the new oil price. On the other hand, if price controls were to apply to the field differently after unitization—with total production from the unit being compared with a single BPCL retroactively constructed for the entire unit (a "unit BPCL")—virtually no production would qualify as new oil.[6]

Those interest owners who would have been entitled to substantial quantities of new oil in the absence of unitization would have blocked the effort to unitize if they had known that, as a result of unitization, the field would

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[5] This resulted both from a field-wide increase in production after 1972 and from the fact that production was increasing on leases in the more "capable" parts of the field as it decreased elsewhere. R. 29751, 10469-70. A well is "capable" if it can produce at the rate allowed (the "allowable") by the Texas Railroad Commission ("TRRC"). Production at Hawkins Field was governed by Maximum Efficient Rate ("MER") rules administered by the TRRC. Under MER rules, as wells in less productive or capable portions of the field become unable to produce at their allowable rate, their excess allowables are redistributed among other wells. As a consequence, production at Hawkins Field was continuously increasing at some leases, and decreasing at others, even before unitization. *See generally* R. 29749-51. MER rules lawfully resulted in the reporting of substantial quantities of new oil as production shifted to more capable leases. *See* 41 Fed. Reg. 1564, 1571-72 (1976).

[6] The courts below determined that during the period of price controls less than 7 percent of the field's production qualified for new oil prices when unit production was measured against a retroactively constructed unit BPCL. *See* R. 31482-83, 31495. In contrast, if unitization simply had been postponed until September 1, 1976, approximately 55 percent of the field's production would have constituted new oil. R. 31480-83, 31495.

lose virtually all of its new oil production. *E.g.*, R. 17384-86, 13370-71, 16179-82. Enhanced recovery was expected to increase production substantially over the life of the field, R. 27992, but on a present value basis the increased revenue from that incremental production would not even make up for the revenue lost from converting the field's new oil into old oil, let alone compenstate for the additional expenditure of more than $220 million. R. 31483-84, 31495.[7] Advance notice that a unit BPCL would be required would have sounded the death knell for unitization at Hawkins Field.

There was no indication, however, that unitization required abandonment of lease-by-lease accounting and adoption of a unit BPCL. To the contrary, the signs pointed in the opposite direction. The key regulatory term, "property," was specifically defined in terms of "a lease or . . . a fee interest," 10 C.F.R. § 212.72 (1975), with no reference at all to units. Even more important, the regulatory objective of increasing production, *e.g.*, R. 28746-52, would be defeated by an interpretation that discouraged enhanced recovery. The agency charged with administering the controls, the Federal Energy Administration ("FEA"), appeared to be interpreting the regulations in a manner consistent with that objective. Exxon was aware, for example, that in March and July, 1974, the agency had advised Austral Oil Company and Pennzoil Company, which were contemplating forming units, "that no formal, written agency interpretations of the property regulation would be forthcoming, but that lease-by-lease accounting was acceptable." App. 232a. *See also, e.g.*, R. 6117-18, 6124, 29852, 4822. A senior agency official, speaking at a public conference, later confirmed FEA's position that lease-by-lease accounting

[7] The net result of adopting a unit BPCL, therefore, would be to reduce the field's aggregate value. The district court speculated that this problem could have been solved by adjusting the participation formula for the unit. App. 201a n.24, 208a-209a n.30. But the problem of a smaller pie cannot be solved by giving some persons bigger pieces.

remained appropriate after unitization. R. 29755-56; App. 233a & n.46.[8]

Exxon and the other interest owners reasonably concluded, on the advice of counsel, that unitization would not mandate a change in the manner in which the price controls applied to Hawkins Field. *E.g.*, R. 5360-62, 5232. (The contrary assertions by TECA and the district court—that Exxon knew that a unit BPCL was required—assumed Exxon's awareness of five supposed "Interpretations" by FEA's Office of General Counsel. Those "Interpretations," however, were secret. They were not made public until 1977, *see* App. 9a-10a, and Exxon had no knowledge of them prior to unitization. R. 6171-74.)[9] The interest owners entered into the unit agreement effective January 1, 1975, and named Exxon to operate the unit. R. 28052. Under the agreement, each interest owner was entitled to take its share of production in kind and to determine the price at which it would be sold. R. 28054. Exxon purchased most of the crude oil for use in its refinery, R. 27993, but one major interest owner, Texaco, Inc., took its share of the oil for use in its own refinery. *E.g.*, R. 19687.

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[8] Exxon had requested an interpretation from FEA with respect to the regulatory term "property" in connection with another matter but was advised that there would be no formal written response to requests concerning that term for "a long time." R. 29763. The agency commonly took two years or more to respond to requests for interpretation. R. 11841, 31919. Long delays were "endemic to the FEA's Office of General Counsel." *Standard Oil Co. v. FEA*, 453 F. Supp. 203, 216 n.69 (N.D. Ohio), *aff'd*, 596 F.2d 1029 (TECA 1978). For more than two years after the promulgation of § 212.72, "no official guidance was provided." *Atlantic Richfield Co.*, 5 DOE ¶ 82,521 at 85,077 (1980).

[9] Indeed, Exxon had sought disclosure of any and all relevant interpretations under the Freedom of Information Act, and the agency had refused to disclose the very interpretations upon which the lower courts relied. R. 6133-37. The courts' use of those interpretations violated 5 U.S.C. § 552(a)(1) ("a person may not in any manner . . . be adversely affected by, a matter required to be published in the Federal Register and not so published").

For more than two years after unitization, Hawkins Field continued to be operated essentially as before. *E.g.*, R. 9866, 10461-62, 10467. Natural gas continued to be recycled in order to slow the decline in reservoir pressure, and under the applicable MER rules production continued to shift to the more capable parts of the field as incapable wells lost production or were shut in. R. 16843-46, 29752-53, 10469-70. Until the underlying regulatory scheme was definitively changed on September 1, 1976, the interest owners continued to account for production on a lease-by-lease basis, treating each lease as a separate property for regulatory purposes as they had done prior to unitization. As a consequence, approximately 56 percent of Hawkins Field production qualified as new oil during this time—not a great increase over the amount that would have qualified in the absence of unitization. *See* note 6, *supra*. And at all times Exxon "accurately represent[ed] its conduct to the agency." App. 260a.

Enhanced recovery began in March, 1977, when the inert gas plant was completed and put into operation. R. 13678-80. As a result of enhanced recovery, the life of the field has been extended and approximately 70 million barrels of additional crude oil will be produced. R. 27992.

3. *Regulatory developments subsequent to unitization.* Following unitization at Hawkins Field, FEA began a bewildering odyssey of regulatory shifts and reversals, repeatedly changing its mind about the appropriate method of accounting for unitized production.

a. *In August, 1975, FEA retroactively rules that lease-by-lease accounting must be abandoned and a unit BPCL adopted immediately upon unitization, even though it earlier had privately advised that lease-by-lease accounting continued to be appropriate after unitization.* During 1974, when Exxon and the other interest owners at Hawkins Field were making their decision to unitize, FEA informally had been advising producers that they could continue lease-by-lease accounting after unitization.

But in August, 1975, eight months after unitization at Hawkins Field, FEA abruptly announced in its Ruling 1975-15 that "where a unit consists of several leases that were unitized [after 1972], the property consists of the unit, and the BPCL is the total 1972 monthly production from all of the several leases that now comprise the unit." 40 Fed. Reg. 40832 (1975). That Ruling, which imposed a rigid *per se* rule requiring adoption of a unit BPCL immediately upon unitization, completely undercut the economic rationale for unitization and enhanced recovery at Hawkins Field. The effect of Ruling 1975-15 was suddenly, and retroactively, to deprive the field of almost all new oil and thereby reduce the field's present value substantially below what it would have been in the absence of unitization and enhanced recovery. R. 31495.

b. *In February, 1976, FEA rescinds its earlier ruling ab initio and rules that lease-by-lease accounting may be continued until the occurrence of a "significant alteration in producing patterns."* It did not take FEA long to realize that Ruling 1975-15 would defeat the regulatory purpose of increasing the production of domestic crude oil.[10] As the district court noted, "Ruling 1975-15 sparked criticism from the oil industry that the unit BPCL requirement would discourage unitization and hence retard efforts to increase domestic production." App. 179a. FEA's General Counsel advised Exxon that it could continue lease-by-lease accounting at Hawkins Field "for a reasonable period of time," R. 29906, and FEA announced that it would reconsider whether "the Ruling has correctly interpreted current regulations." 41 Fed. Reg. at 1569.

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[10] Indeed, just four days after issuance of Ruling 1975-15, FEA's formal adjudicatory arm, the Office of Exceptions and Appeals, held that lease-by-lease accounting was required by the regulations and that a unit was not permitted to adopt a unit BPCL—precisely the opposite of what Ruling 1975-15 purported to require. *Empire Drilling Co.*, 2 FEA ¶ 83,142, *aff'd*, 2 FEA ¶ 80,676 (1975). *See also Sun Oil Co.*, 2 FEA ¶ 83,075 (1975).

On February 1, 1976, after notice and opportunity for public comment, FEA flatly repudiated the position taken in Ruling 1975-15. The agency stated that an important purpose of two-tier price controls was "to provide additional incentives for enhanced recovery," 41 Fed. Reg. 4931, 4932 (1976), and it acknowledged that the interpretation set forth in Ruling 1975-15 "may act in some cases to discourage projects designed to increase production, such as the initiation of enhanced recovery projects in unitized fields, and may in other cases act to discourage unitization altogether," *id.* at 4936. FEA pointed out in particular that a producer would be "discouraged from entering a unitization agreement to facilitate an enhanced recovery project . . . if the effect of unitization would be to reclassify some of his current [new oil] production as [old] oil." *Id.* at 4938.

The obvious implication of this analysis was that no producer should be required to adopt a unit BPCL if to do so would reduce the amount of new oil to which it had been entitled prior to unitization. But FEA did not carry the analysis to its logical conclusion. Instead, FEA announced that "Ruling 1975-15 is rescinded *ab initio* insofar as it requires producers of unitized properties to total all the BPCL's of the participating leases and to treat the unit as a single property, before such time as there has been a significant alteration in pre-unitized producing pattern of the individual leases." *Id.* at 4937. The agency further explained that "[o]nce enhanced recovery operations begin, the producer will be required to calculate a unitized BPCL, as set forth in new 10 CFR 212.75 below, and to treat the unit as a distinct property." *Id.*

The "new 10 CFR 212.75" to which FEA referred was promulgated simultaneously with the partial rescission of Ruling 1975-15. It made explicit that unitized fields would be permitted to continue lease-by-lease accounting until "the date production patterns with respect to individual leases . . . are substantially altered." *Id.* at

4941.[11] The concept of a significant or substantial alteration in producing patterns was new to the regulatory scheme. FEA did not explain what it meant, or how it had been derived from the regulatory definition of "property," or why it would not also discourage enhanced recovery. The agency stated only that it would clarify the new concept in a later ruling. *Id.* at 4937.

Thus, as of February 1, 1976, Ruling 1975-15's rigid *per se* requirement that a unit BPCL be adopted immediately upon unitization had become a nullity. It had been repudiated as an interpretation of the regulations because it was inconsistent with an essential regulatory purpose. It was formally replaced as governing law, *ab initio*, by the generic rule that adoption of a unit BPCL could be postponed until the occurrence of a significant or substantial alteration in producing patterns.

c. *In May, 1976, FEA determines that continued lease-by-lease accounting at Hawkins Field is proper under the standard of "significant alteration in producing patterns."* Following the agency's partial rescission of Ruling 1975-15, FEA conducted an audit of Exxon, including production at Hawkins Field, and issued an audit review report in May, 1976. R. 28264. The report concluded that lease-by-lease accounting for the field's production remained proper under the standard of significant or substantial alteration in producing patterns. R. 28266, 28268.

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[11] Alternatively, the regulation required adoption of a unit BPCL upon the "implementation of enhanced recovery operations," which was defined as a method "of recovering crude oil in which part of the energy employed to move the crude oil through the reservoir is applied from extraneous sources . . . ." 41 Fed. Reg. at 4941. (That provision was deleted effective September 1, 1976.) The mere recycling of natural gas at Hawkins Field, unlike the subsequent manufacture and injection of inert gas, did not "move the crude oil through the reservoir" and thus did not constitute "enhanced recovery operations." R. 13672-80, 9861-62, 10438-42. Moreover, when the agency later defined "enhanced recovery" in greater detail, it made explicit that gas recycling was not enhanced recovery. *See* 10 C.F.R. § 212.78(c) (1979).

d. *In August, 1976, FEA defines "significant alteration in producing patterns" as either the injection of gas or an increase in allowables (regardless whether producing patterns actually had changed) but grants to unitized fields the ameliorative benefit of "imputed new oil."* In late August, 1976, FEA amended 10 C.F.R. § 212.75 effective September 1, 1976, to define "significant alteration in producing patterns" to mean "the occurrence of either (1) the application of extraneous energy sources by the injection of liquids or gases into the reservoir, or (2) the increase of production allowables for any property that constitutes the unitized property." 41 Fed. Reg. 36172, 36184 (1976). This arbitrary definition, which even covered situations where there had been no change in producing patterns at all, caught both the industry and personnel within the agency by surprise. R. 30101.[12]

The first prong of the definition arguably required adoption of a unit BPCL immediately upon any injection of gas even if, as at Hawkins Field prior to March, 1977, such injection were merely part of a continuing recycling project that had no effect on producing patterns. The second prong of the definition was even harsher: it appeared to require adoption of a unit BPCL immediately upon unitization in any field governed by state MER rules, for under such rules production allowables are continuously shifting by operation of state law irrespective of unitization. *See* note 5, *supra.*

On the other hand, the harshness of the approach embodied in the new definition was softened by a major mitigation. Along with the new definition FEA added to § 212.75 a provision allowing any "producer of crude oil from a unitized property" to report "imputed new oil" equal to the volume of new oil produced and sold during

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[12] As one lawyer employed by the agency stated at his deposition, "the reaction was that you had what appeared to be a fairly broad, vague term, significant alteration of producing patterns, and an extremely explicit definition [that] would seem not to fit in exactly with the terminology. It wasn't the kind of definition I think that the auditors expected." R. 17728.

the 12 month period immediately preceding adoption of a unit BPCL. 10 C.F.R. § 212.75(b), (d) (1977). This provision removed the disincentive to unitization otherwise associated with the requirement of a unit BPCL, for it "ensured that once a unit BPCL has been established there will be no decrease in absolute volumes of new crude oil." 41 Fed. Reg. at 36182. Thus, the new definition of "significant alteration in producing patterns" and the new benefit of "imputed new oil," taken together, did what the agency's various constructions of the regulations theretofore had failed to do—conform the requirement of a unit BPCL to the regulatory objective of increased production.

Exxon determined that the new definition required the adoption of a unit BPCL at Hawkins Field. R. 30109. But because the new definition was set forth as a new regulatory amendment and was not made retroactive, Exxon believed that it required such adoption only as of its effective date. R. 30109-10, 30115. Exxon conferred with FEA's Assistant General Counsel for Pricing, who "confirmed that this interpretation is reasonable." R. 30115. *See also* R. 5549. Consequently, Exxon adopted a unit BPCL as of September 1, 1976, and calculated "imputed new oil" based upon production from the unit during the preceding 12 months.

e. *In January, 1977, FEA announces that (1) the standard of "significant alteration in producing patterns" will be applied only as of September 1, 1976, to units formed on or after February 1, 1976, but will be applied retroactively, with the August, 1976, definition being used "as guidance," to units formed before February 1, 1976, (2) the benefit of "imputed new oil" will be denied to all units required to adopt a unit BPCL before September 1, 1976, but (3) operators of units formed before February 1, 1976, will be afforded an opportunity, on a case-by-case basis, to establish a reasonable alternative date for adopting a unit BPCL.* If matters had rested with the amendments to 10 C.F.R. § 212.75 in August, 1976, this case never would have arisen. But FEA reversed

direction again in January, 1977, when it issued new rules in the form of "interpretations." In Ruling 1977-2, 42 Fed. Reg. 4409 (1977), FEA "interpreted" its regulations as treating units formed before February 1, 1976, much less favorably than units formed on or after that date. The agency stated that units formed on or after February 1, 1976, would not be subject to the standard of "significant alteration in producing patterns" until September 1, 1976. *Id.* at 4415. In contrast, FEA stated that units formed before February 1, 1976, had been required to abandon lease-by-lease accounting and adopt a unit BPCL whenever "significant changes in the unit's producing patterns occurred," *id.*, even if those changes had taken place before the agency had first articulated the standard of "significant alteration in producing patterns."

If FEA simply had stopped there, Ruling 1977-2 would have had no apparent adverse effect at Hawkins Field—enhanced recovery did not begin at the field until March, 1977, and until that time, as FEA had recognized in its audit of Exxon, there would be no need to adopt a unit BPCL under the generic standard of "significant alteration in producing patterns." But FEA did not stop there. Instead, it went on to state:

> Although a regulatory definition of "significant alteration in producing patterns" was not provided until September 1, 1976, that definition will be considered as guidance in audits and compliance cases in determining whether a significant alteration has occurred with respect to such units [formed before February 1, 1976].

Id. The agency did not explain what it meant by the retroactive use of the August, 1976, definition "as guidance." But rigid retroactive application of that definition arguably required adoption of a unit BPCL at Hawkins Field immediately upon unitization—precisely the result that the agency itself had rejected just one year earlier when it rescinded the relevant portion of Ruling 1975-15.

Even so, if FEA had stopped there the consequences for Hawkins Field, although severe, would not have been catastrophic. Under the provision of § 212.75 allowing the reporting of "imputed new oil," the interest owners would have been permitted to continue to sell at new oil prices at least the amount of new oil produced during the 12 months preceding adoption of a unit BPCL, which for Hawkins Field in 1974 had been 34 percent of the field's total production. But FEA proceeded in Ruling 1977-2 to characterize that provision in a manner calculated to deny the interest owners at Hawkins Field even that consolation. Without any explanation, FEA announced that the ameliorative benefit of "imputed new oil" was available only to "unit BPCL's established on or after [September 1, 1976]," *id.* at 4414, even though neither the regulatory text nor the accompanying preamble had contained any such restriction.

FEA apparently recognized that this package of purported interpretations discriminated harshly against units (such as the Hawkins Field unit) formed before February 1, 1976. Presumably for that reason, FEA further announced that it would, "on a case-by-case basis, permit unit operators to justify the establishment of the date of significant alteration in producing patterns in such units on reasonable bases other than those specified by the present definition." 42 Fed. Reg. at 4415.[13]

f. *In January, 1978, DOE takes the position that a unit BPCL should have been adopted at Hawkins Field by June, 1975.* After the issuance of Ruling 1977-2, the agency followed the unusual procedure of conducting a second audit of Hawkins Field. R. 22341. At its conclusion, the Department of Energy ("DOE"), which had succeeded to FEA's functions, instituted an administra-

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[13] If nothing else, Ruling 1977-2 confirmed the admission made to Congress by FEA's Deputy Administrator that the meaning of the "property" definition "was not even clear to the regulatory agency itself." *Hearings on Crude Oil Pricing Compliance Problems Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 103 (1976).

tive enforcement action against Exxon by issuing a notice of probable violation ("NOPV"), which asserted that there had been a "significant alteration in producing patterns" not later than June, 1975, and that Exxon had violated the regulations by not adopting a unit BPCL as of that date. R. 29802-03. In response, Exxon contended, *inter alia*, that it had not been required to adopt a unit BPCL prior to September 1, 1976, and that a more reasonable date for marking the occurrence of a "significant alteration in producing patterns" was March, 1977, when enhanced recovery operations began with the manufacture and injection of inert gas. R. 32649-50.

The agency never responded to Exxon's suggestion that March, 1977, was a reasonable alternative date for adopting a unit BPCL. No administrative hearing or inquiry into that issue was undertaken, and none has occurred to this day. The agency simply ignored its own Ruling 1977-2, which granted unit operators the right to submit evidence, on a case-by-case basis, to justify a reasonable alternative date. Instead, in June, 1978, DOE withdrew the NOPV and caused this action to be instituted in the United States District Court for the District of Columbia pursuant to section 209 of the Economic Stabilization Act of 1970 ("ESA"), *as amended*, 12 U.S.C.A. § 1904 note (1980).[14]

4. *The district court's opinion.* The district court, without conducting a trial on any issue, entered summary judgment against Exxon in the amount of $1,635,604,638.10, plus post-judgment interest. App. 4a n.3.

a. *The district court applies the August, 1976, definition retroactively as a binding legal rule and holds that it required adoption of a unit BPCL at Hawkins Field on January 1, 1975.* The district court gave retroactive application to the August, 1976, definition of "significant

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[14] The district court's jurisdiction rested on section 211(a) of the ESA, as incorporated by section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627, 633.

alteration in producing patterns" not merely "as guidance" but with the full force and effect of a binding legal rule. The court concluded that "under either prong of the regulatory definition—an increase in production allowables at any constituent property, or gas injection—a significant alteration in producing patterns occurred at the Hawkins Field on January 1, 1975." App. 231a. By applying that definition retroactively, the court sidestepped the necessity of conducting a trial to resolve disputed questions of fact implicated by the generic standard of "significant alteration in producing patterns" that the agency had announced in February, 1976.[15]

b. *The court approves both the selectively retroactive application of the August, 1976, definition and the denial to Exxon of the benefit of "imputed new oil."* The district court brushed aside Exxon's objections that application of the August, 1976, definition contained in 10 C.F.R. § 212.75 was both retroactive and discriminatory. The court asserted that Exxon "suffered no injury from retroactive application . . . because [the new interpretation] . . . was less stringent than the rule it replaced." App. 213a. In reaching this conclusion, the court apparently assumed that the rule "replaced" by the August, 1976, definition was the rigid *per se* requirement of Ruling 1975-15. But Ruling 1975-15 had been repudiated

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[15] All fourteen petroleum engineering experts deposed by the parties, including DOE's own expert, had testified that there had been no significant alteration in producing patterns at Hawkins Field until March, 1977, when enhanced recovery began with the manufacture and injection of inert gas. R. 29517-39. At their depositions, the expert witnesses had testified, *inter alia*, that the recycling of natural gas and the shutting in of incapable wells during 1975 and 1976 had made no appreciable difference in the field's producing patterns and that, until the manufacture and injection of inert gas began in March, 1977, the pattern of production had remained virtually the same as it would have been in the absence of unitization. *E.g.*, R. 10426-27, 2977-78, 9858-59, 17246-47, 14815-16. Their testimony further established that Exxon, as the operator of Hawkins Field, had followed sound conservation practices and had not sought to maximize the production of new oil. *E.g.*, R. 23165, 23250, 23278-79.

and rescinded by the agency *ab initio*, with the consequence that it had been stripped of its authority as a valid interpretation of the regulations. The rescission of Ruling 1975-15 explicitly permitted a producer, after unitization, "to postpone establishing a unit BPCL and to continue lease-by-lease accounting until production patterns had been significantly altered, perhaps months or even years later." *Id.* Thus, the pre-existing rule actually was substantially less stringent than the August, 1976, definition, which required adoption of a unit BPCL upon an injection of gas or increase in allowables, whether or not there had been any change in producing patterns.

The district court acknowledged that the August, 1976, definition was being applied retroactively to units formed before February 1, 1976, but only prospectively, from and after September 1, 1976, to units formed on or after February 1, 1976. App. 215a-217a. The court reasoned, however, that such disparity in treatment was not unlawfully discriminatory because those two categories of units were "not similarly situated." *Id.* But the agency itself had announced that units formed before and after February 1, 1976, were subject to the same legal standard of significant or substantial alteration in producing patterns. *See* 41 Fed. Reg. at 4937, 4941. Such units therefore were similarly situated—until the agency announced in Ruling 1977-2, after the fact, that it intended to treat them differently.

The district court further approved FEA's determination to deny the benefit of the provision for "imputed new oil" in § 212.75 to units that were required to adopt unit BPCLs prior to September 1, 1976. The court made no effort whatsoever to square that determination with the language of the regulation itself. The court acknowledged, moreover, that the denial of the benefit of "imputed new oil" constituted yet another selective discrimination against Hawkins Field because other units formed before September 1, 1976, were granted that benefit. App. 218a-219a n.35. The court conceded that the dis-

crimination might be irrational but held that it was enforceable nonetheless. *Id.* This irrational denial of the benefit of "imputed new oil" roughly doubled Exxon's liability.

c. *The court refuses to consider the question of a reasonable alternative date for adopting a unit BPCL.* Having determined that the August, 1976, definition, retroactively applied, required adoption of a unit BPCL immediately upon unitization at Hawkins Field, the district court upheld the agency's refusal, without any hearing or inquiry, to permit Exxon to establish a reasonable alternative date—a procedure expressly promised by the agency in Ruling 1977-2. The court also refused to consider any reasonable alternative date itself. Although Exxon had sought to establish such a date in its response to the agency's NOPV, and had raised the matter again in its pleadings in court, the court flatly stated that "the question of what might be a reasonable alternative basis to justify the establishment of the date of significant alteration is not before the court." App. 226a n.38.[16]

d. *Under a statute that allows only "restitution of moneys received," the court orders Exxon to pay, with prejudgment interest, amounts that it never received to persons who suffered no harm.* The district court further held that, even though Exxon was the buyer rather than the seller of almost one-third of the field's production, because "Exxon was the prime mover and animating force behind the formation and operation of the Hawkins Field Unit . . ., Exxon may be held responsible for all overcharges at the field." App. 240a.[17] Instead of under-

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[16] The court further observed that it would not be reasonable to look solely at "changes in the field's underground drive mechanism." App. 226a n.38. But the court did not respond to Exxon's basic argument that producing patterns had not been significantly altered until the initiation of enhanced recovery in March, 1977—a process characterized by the above-ground phenomena of manufacturing and injecting inert gas.

[17] It has never been determined that any consumer of petroleum products actually was "overcharged." Exxon was "overcharged,"

taking to determine who, if anyone, had been injured by the purported "overcharges," the court simply ordered Exxon to make payment to the several States pursuant to an allocation formula. *See* App. 254a-257a. The court further assessed prejudgment interest "based on an average of prime rate values." App. 259a.[18]

5. *TECA's opinion.* The court of appeals affirmed "in all respects." App. 92a.

a. *TECA holds that the definition of "property" in 10 C.F.R. § 212.72 required adoption of a unit BPCL immediately upon unitization in every case, notwithstanding FEA's explicit determination to the contrary when it rescinded Ruling 1975-15 ab initio.* Apparently as a way of avoiding issues of fact and problems of retroactivity and discrimination, TECA stated that the case really was very simple: the mere definition of "property" in 10 C.F.R. § 212.72 ("the right which arises from a lease or from a fee interest to produce domestic crude oil") had "required the establishment of a single BPCL upon unitization of the Hawkins Field." App. 29a. Thus, the case came back full circle to the regulatory

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by the lower courts' reckoning, when it bought crude oil from other interest owners, and to some extent the new oil price was spread among other refiners through the mechanism of the "entitlements program." *See* 10 C.F.R. § 211.66 *et seq.* (1981). It has never been determined, however, that Exxon or any other refiner passed such "overcharges" through to consumers in the prices of refined petroleum products.

[18] The court purported to follow "the schedule of interest rates [DOE] has applied in administrative enforcement actions since February 1980." App. 259a. In fact, that schedule is applied in administrative proceedings only prospectively from and after either April 10, 1981 (the date of its adoption) or the point in the proceedings when enforcement officials request its application, whichever is later. *E.g., Texas Pacific Oil Co.*, 12 DOE ¶ 83,020 at 86,262 (1984); *MGHC, Inc.*, 10 DOE ¶ 83,021 at 86,226 (1983). The government in this case did not request application of the new schedule until August 27, 1982, *see* R. 23537, yet the district court applied the schedule retroactively to January 1, 1975. The court's retroactive application of the schedule increased Exxon's liability by more than $250 million. R. 31476-77, 31490, 31654.

interpretation that had been suggested by the agency in Ruling 1975-15. But FEA had flatly repudiated that interpretation when it rescinded Ruling 1975-15 *ab initio* in February, 1976. FEA had done so, moreover, specifically because that interpretation was inconsistent with the regulatory objective of increasing oil production through enhanced recovery—an objective that had been furthered, at substantial private expense, by the interest owners at Hawkins Field.

b. *TECA holds in the alternative that the district court was correct in applying the August, 1976, definition and in denying the benefit of "imputed new oil."* Quoting extensively from the district court's opinion, the court of appeals further held that application of the August, 1976, definition to Hawkins Field was not impermissibly retroactive or discriminatory. App. 35a-43a. To give that holding plausibility, TECA resorted to invention, stating that Exxon's "decision to unitize and to account upon a lease-by-lease basis was made in 1974, with full knowledge that Section 212.72 . . . required unit wide accounting upon unitization." *Id.* at 39a. That statement could not properly be made on summary judgment and in fact was incorrect. *See* pages 4-7, *supra*. Further, TECA wrongly brushed aside as "after the fact speculation," App. 40a, Exxon's contention that it and the other interest owners would not have signed a unit agreement if they had known that a unit BPCL would have been required upon unitization—a contention supported both by uncontroverted testimony, *e.g.*, R. 17384-86, 13370-71, 16179-82, and by documents prepared before the unit agreement was signed, *e.g.*, R. 29832, 29834-37, 29839-45.

TECA also approved the denial of the benefit of "imputed new oil" to Hawkins Field. Like the district court, TECA ignored the regulatory text, which makes that benefit available without regard to when a unit is formed

or a unit BPCL adopted.[19] Instead of applying the regulation as it was written, the court announced that "the agency need not give the benefits of Section 212.75 to . . . pre-existing units." App. 42a.[20]

c. *TECA "affirms" a purported holding by the district court that Exxon had failed to establish a reasonable alternative date.* Although the district court had refused even to consider Exxon's contention that March, 1977, was a reasonable alternative date for adopting a unit BPCL, *see* App. 226a-227a n.38, TECA claimed that "the trial court further determined that Exxon had failed to justify another date upon some other 'reasonable basis,' as allowed by Ruling 1977-2." App. 52a. TECA then proceeded to "affirm" that purported determination on two grounds: *first*, because "production across lease lines began in January, 1975," App. 53a, even though such shifts in production occur continuously in a field governed by state MER rules whether or not the field has been unitized; and *second*, because "any resort to the testimony of expert petroleum engineers for the purpose of determining a reasonable alternative date for a significant alteration in production methods at Hawkins Field would be unworkable," App. 54a-55a, even though Ruling 1977-2

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[19] TECA's description of § 212.75 uses a highly misleading quotation to make it appear as if the regulation by its terms applied only to units formed on or after February 1, 1976. *See* App. 10a. In fact, the regulation contained no such language. TECA was simply quoting, without attribution, from the inaccurate description of the regulation that appeared at page 9 of the government's brief.

[20] In fact, the agency in Ruling 1977-2 had acted to deny the newly created benefit of "imputed new oil" only to some, not to all, pre-existing units. Units formed before February 1, 1976, were entitled to "imputed new oil" if they had not experienced a "significant alteration in producing patterns" before September 1, 1976, and units formed on or after February 1, 1976, were granted the benefit even if they had experienced a "significant alteration in producing patterns" before September 1, 1976. *See* 42 Fed. Reg. at 4414-15.

explicitly called for such determinations to be made "on a case-by-case basis," 42 Fed. Reg. at 4415.[21] Thus, TECA not only approved the agency's departure from its own procedures but denied Exxon any comparable judicial remedy as well.

d. *TECA upholds the imposition of liability for "overcharges" committed by other interest owners, the award of excessive prejudgment interest, and the selection of the several States as the recipients of "restitution."* Like the district court, the court of appeals made no real attempt at balancing the equities. Instead, TECA administered the equitable standard of "restitution of moneys received" under section 209 of the ESA as if it were a nondiscretionary command to award damages. TECA determined that, in the interest of administrative convenience, Exxon as the operator of the unit should be held liable for all overcharges occurring at Hawkins Field. App. 55a-61a.[22]

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[21] TECA further justified its decision by asserting that "Exxon admitted that gas injection at the Hawkins Field Unit was an enhanced recovery operation." App. 51a. That was factually incorrect. The documents on which TECA relied explicitly distinguished between the recycling of gas and the injection of inert gas and identified only the latter, which did not begin until March, 1977, as enhanced recovery. *See, e.g.*, R. 13678-80, 24365, 24681.

[22] TECA strained to find that Exxon had "caused" all overcharges. For example, the court reasoned as follows that Exxon had caused Texaco to commit overcharges:

> Because Exxon was pricing other oil from the field upon a lease basis, it was paying larger royalties than Texaco for "new oil." As a result, some royalty owners threatened to sue Texaco. This caused Texaco to adopt Exxon's method of calculation . . . .

App. 62a. On that basis, Exxon was held liable for more than $100 million in overcharges and interest attributable to crude oil owned and sold or refined by Texaco. *See* R. 31473, 31490. In addition, TECA held Exxon liable even for alleged "overcharges" attributable to crude oil owned and sold by interest owners who had entered into settlements with DOE covering those "overcharges." *See* App. 67a-71a.

In its zeal, TECA even affirmed a holding that Exxon must pay approximately $500,000, including prejudgment interest, with re-

Then, apparently forgetting that Exxon was being held liable for hundreds of millions of dollars attributable to crude oil produced and sold by other interest owners—crude oil that Exxon actually had purchased and with respect to which Exxon itself had paid the "overcharges"—TECA approved the award of prejudgment interest as a means of depriving Exxon of "the benefits Exxon obtained by having the use over the years of the money illegally obtained." App. 71a. TECA concluded by approving the selection of the several States as the recipients of "restitution" on the theory that they represented the consuming public, whom TECA simply assumed had been injured.[23]

REASONS FOR GRANTING THE PETITION

The judgment which we ask this Court to review violates the most fundamental canon of Anglo-American administrative law: the principle that when government seeks to apply coercive force to interfere with a citizen's liberty or property, it do so on the basis of law, *i.e.*, on the basis of general and knowable rules and standards that are consistent with the statutory purpose and that have been formulated and articulated in advance with sufficient coherence and clarity to assure that the citizen is not being singled out retroactively for *ad hoc* discrimi-

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spect to production that not even the government claims was wrongly priced (production owned by third persons whose interests were not included in the unit). This amount had been mistakenly included by the government in the figures it submitted to the district court, and Exxon had asked the district court to eliminate it from the calculation of liability. R. 31448-49. For reasons of its own, the government refused to acknowledge its error, and TECA gave the issue the back of its hand, incorrectly asserting, without further explanation, that "this new argument, presented by a footnote to the Exxon [appellate] brief, was not properly raised or preserved for our review on appeal." App. 66a-67a.

[23] One member of the panel dissented on the ground that there should have been a trial "to identify the victims of the illegal overcharges or the amounts of the damages suffered by each victim or groups [*sic*] of victims." App. 94a.

natory punishment. This principle lies at the heart of due process.

The decision below "is an ominous one to those who believe that men should be governed by laws that they may ascertain and abide by." *Securities and Exchange Commission v. Chenery*, 332 U.S. 194, 211 (1947) (Jackson, J., dissenting). It is lawless, in the most literal sense, for government to create an uncertain, constantly shifting, and incoherent crazy-quilt of regulatory prescriptions—ones from which it is impossible to derive an understandable legal standard—and then, later, to pick and choose among the kaleidoscope of potential rules that have thus been put into play in order retroactively to manufacture the most punitive possible solution. This Court has no task more noble or significant than to demonstrate that the principle of legality is fundamental and may not be skirted and elided in order to visit punishment, whether on the most humble person or the largest corporation in the land. *Cf. Thompson v. Louisville*, 362 U.S. 199 (1960); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973).

The most striking aspect of this case is the way in which the regular norms of the legal system were, again and again, brushed aside or bent by the agency and lower courts in order to single out Exxon for the imposition of a staggering punitive liability. Symptomatic of this approach (and these are only examples) are (i) TECA's application to Exxon of a regulatory interpretation that the agency itself had formally repudiated as inimical to the purposes of the regulatory enterprise; (ii) the lower courts' eagerness to apply FEA's onerous August, 1976, definition retroactively to conduct occurring long before its promulgation, while at the same time refusing to allow Exxon the ameliorative benefit that the agency itself had designed to mitigate the harshness of that definition; (iii) the lower courts' uncritical acceptance of the irrational and bizarre discriminations created by the agency's Ruling 1977-2; (iv) the lower courts' unexplained refusal to make the agency comply with its own

announced rule that it would, on a case-by-case basis, give firms an opportunity to be heard with respect to a "reasonable" alternative date; and (v) the lower courts' high-handedness on virtually every aspect of the matter of remedy.

TECA threaded its way through the regulatory scheme, picking and choosing among the agency's pronouncements, taking those most damaging to Exxon (no matter how arbitrary, unfair, and textually unjustified) and rejecting those favorable to Exxon (no mater how reasonable and firmly rooted in administrative practice). The court similarly threaded its way through the record, making only those inferences and selecting and finding only those facts (even though disputed) that supported the government, in violation of the basic principles that govern summary judgment practice under Fed. R. Civ. P. 56. *See, e.g., Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). Charged with the duty of enforcing the equitable remedy of restitution, the court imposed the severest possible monetary liability. The resulting judgment—that Exxon is liable for more than two billion dollars for achieving precisely the increase in crude oil production that the agency had sought to encourage—represents a fundamental miscarriage of justice, one so extreme as to constitute a denial of due process.

The judgment also represents a blithe disregard for many of the fundamental rules of administrative law that have been developed by this Court as necessary elements of legality and regularity—rules binding agencies to follow their own announced regulations; rules ensuring that retroactive liabilities may be imposed only on the basis of standards foreshadowed by common-law-style developments and only where they are justified by serious administrative necessities; rules imposing canons of equal treatment even within areas of broad administrative discretion; rules requiring agencies to follow their own designated procedures; rules insisting that remedies have a rational nexus with the underlying substantive findings. These rules all have as their unifying premise the central

principle that every citizen is entitled, as of right, to treatment in the regular course of law under general standards applicable to all and knowable in advance. It is in order to reaffirm the primacy of these rules—in order to insist that not even one of the largest corporations in the land may be singled out for *ad hoc* retroactive and discriminatory punishment—that we ask this Court to review.[24]

1. *TECA fundamentally erred in adopting a construction of 10 C.F.R. § 212.72 that had been repudiated by the agency as substantively invalid.* At the time Hawkins Field was unitized, the crucial regulatory term "property" was defined by 10 C.F.R. § 212.72 as "the right which arises from a lease or from a fee interest to produce domestic crude oil." There was nothing in either the text of the regulation or in the regulatory preamble to indicate when, if ever, a unit would be required to be treated as a property.[25] It therefore would be perfectly reasonable to read the regulation as permitting leases to continue to be treated as properties without regard either to unitization or to events subsequent to unitization. In-

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[24] It is particularly important to affirm that these rules have primacy in litigation before TECA. For nearly a decade, commentators have criticized TECA for one-sidedness and for "show[ing] little concern for 'principled fairness.'" Elkins, *The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility*, 1978 DUKE L. J. 113, 151. *See also* Burke, *Report to ABA Economic and Resources Controls Committee on Economic Stabilization Program Litigation*, 32 BUS. LAW. 1259, 1286 (1977). TECA's perceived failure to adjudicate fairly has become widely recognized. *See* American Bar Association, Administrative Law Section, *Recommendations and Report to the House of Delegates, American Bar Association: Report on Appellate Review for Emergency Programs* 11 (1984). Our own review indicates that in its fifteen years of existence TECA has never reversed a civil judgment in the agency's favor on the merits of a regulatory issue and that it has ruled in the agency's favor in approximately 90 percent of all appeals.

[25] As the agency has acknowledged, "[t]here was no discussion of the term property in the preamble to the final regulations." 42 Fed. Reg. 3628, 3630 (1977).

deed, this is the only construction that appears textually justified.

FEA, of course, gave the regulation a different reading. In Ruling 1975-15, the agency's first public pronouncement on the issue, FEA construed § 212.72 as requiring a unit to be treated as a property immediately upon unitization. But a few months later, when FEA realized that such a construction would defeat an important regulatory objective—that of encouraging the increased production of domestic crude oil through the implementation of enhanced recovery techniques—it construed the regulation as requiring a unit to be treated as a property only at "such time as there has been a significant alteration in pre-unitized producing patterns of the individual leases." 41 Fed. Reg. at 4937.[26]

Confronted with the plain meaning of the regulatory text and the formally announced (albeit different) administrative interpretation, TECA chose neither. Instead, the court went on an inexplicable frolic of its own, construing the regulation as requiring a unit to be treated as a property immediately upon unitization—precisely the interpretation that FEA had explicity repudiated as substantively invalid in rescinding the relevant portion of Ruling 1975-15 *ab initio*.[27]

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[26] This official interpretation obviously takes precedence over the later *post hoc* rationalizations of the agency's litigation attorneys, who in this case argue that § 212.72 required adoption of a unit BPCL upon unitization. *See, e.g., Securities Industry Ass'n v. Board of Governors*, 104 S. Ct. 2979, 2983 (1984).

[27] FEA had not just explicitly repudiated the construction TECA chose to give to the regulation. On at least five separate occasions before September 1, 1976, FEA had explicitly stated that units were permitted, if not required, to continue lease-by-lease accounting after unitization: (1) FEA's informal advice to producers, such as Austral Oil Company and Pennzoil Company, *see* page 6, *supra*; (2) the decisions by FEA's Office of Exceptions and Appeals in *Empire Drilling* and *Sun Oil*, *see* note 10, *supra*; (3) the advice given to Exxon by FEA's General Counsel, *see* page 9, *supra*; (4) FEA's audit of Exxon, *see* page 11, *supra*; (5) the advice given to Exxon by FEA's Assistant General Counsel for Pricing, *see* page

This Court repeatedly has taught that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). *See also, e.g., United States v. Larionoff*, 431 U.S. 864, 872-73 (1977). It was flagrant error for TECA to depart from both "the plain words of the regulation and [the] relevant interpretations of the Administrator," *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. at 414, and to insist upon its own idiosyncratic reading of § 212.72. TECA could not lawfully impose on Exxon as "law" a standard that had been rescinded and repudiated and that therefore did not exist as "law." TECA's decision in this regard constitutes a blatant departure from the fundamental principle of legality that lies at the heart of due process.

2. *TECA's retroactive and discriminatory application of 10 C.F.R. § 212.75 violates three important principles of administrative due process established by the decisions of this Court.*

a. *TECA's interpretation of the new regulatory definition as having retroactive effect violates this Court's "first rule of construction."* When FEA amended 10 C.F.R. § 212.75 in August, 1976, to add a new and restrictive definition of "significant alteration in producing patterns," it gave no hint that the new definition was to be applied retroactively. The amendment was made "effective September 1, 1976," 41 Fed. Reg. at 36184, and neither the regulatory text nor the preamble suggested that the new definition would operate so as to require adoption of a unit BPCL before the effective date. Nevertheless, the district court and TECA, without explana-

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13, *supra*. By construing the regulation differently in 1985 (and by wrongly claiming that Exxon knew all the time what was required by the regulation as so construed), TECA was holding Exxon to a far higher standard of knowledge of the regulations than FEA itself could have met.

tion, applied the new definition retroactively as a binding rule of law.[28]

It was plain error to construe the August, 1976, definition as having retroactive effect. As this Court has explained,

> the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

Greene v. United States, 376 U.S. 149, 160 (1964) (footnote omitted). Retroactive application of the August, 1976, definition interfered with antecedent rights; by its terms the definition was not retroactive; and at the time of promulgation the agency manifested no intention to make it retroactive. "An administrative regulation is subject to the rule equally with a statute; and accordingly, the regulation here involved must be taken to operate prospectively only." *Miller v. United States*, 294 U.S. 435, 439 (1935).

b. *TECA's retroactive application of the August, 1976, definition violates established principles of due process.* A new rule cannot be applied retroactively "to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways." *Lewellyn v. Frick*, 268 U.S. 238, 252 (1925). Yet, this is precisely what the lower courts did. They construed the August, 1976, definition as retroac-

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[28] In Ruling 1977-2, FEA had indicated that for earlier periods the definition was to be used only "as guidance," not as a binding rule of law. 42 Fed. Reg. at 4415. The district court, however, explicitly applied the new definition retroactively as a binding rule. *See* App. 231a. TECA acknowledged that "the argument is made that . . . the agency intended that the Section 212.75 definition of substantial [*sic*] alteration be used only as 'guidance,'" App. 44a, but then proceeded to apply the definition retroactively as a binding rule anyway. *See* App. 45a-51a.

tively requiring the operator of a unit to adopt a unit BPCL upon the occurrence of events—the injection of gas and an increase in allowables—that were occurring continuously at Hawkins Field even before unitization. If the interest owners at Hawkins Field had known in 1974 that such a regulation would be promulgated in August, 1976, and applied retroactively to require the adoption of a unit BPCL immediately upon unitization in January, 1975, they would not have unitized; they would not have spent more than $220 million in order to increase the production of crude oil through enhanced recovery.

Retroactive application has the effect of substantially reducing, after the fact, the volume of crude oil that qualified for the higher new oil price. It converts new oil into old oil after the fact, making prices that had been lawful when charged unlawful retroactively. That result conflicts with this Court's decision in *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370 (1932). That case stands for the proposition that rate orders cannot be amended retroactively in a manner that renders unlawful prices that had been lawful when charged. The agency "could repeal the order as it affected future action, and substitute a new [prospective] rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the legislature itself." *Id.* at 389.[29]

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[29] Only last year, this Court reaffirmed that "an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests." *Heckler v. Community Health Services Inc.*, 104 S. Ct. 2218, 2224 n.12 (1984). When they entered into the unit agreement, the interest owners relied upon the determination of their rights under existing law, which they reasonably construed as permitting the continuation of lease-by-lease accounting. The retroactive application of a new regulation that foreclosed that possibility unquestionably constituted an undue intrusion—one that cannot be squared with traditional notions of due process. *See, e.g., Central Illinois Public Service Co. v. United States*, 435 U.S. 21, 32 (1978); *Forbes*

To be sure, due process does not bar all retroactivity. But to be lawful, retroactive application must be "justified by a rational legislative purpose." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 104 S. Ct. 2709, 2718 (1984). No such purpose is served by retroactive application of the August, 1976, definition. Retroactivity simply imposes horrendous, pointless, and unfair liability. "[T]here can be no constitutional justification for arbitrarily imposing millions of dollars of additional liabilities . . . in respect of transactions long closed." *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330, 354 (1935).[30] To the extent that the August, 1976, definition operates as a retroactive rule, therefore, it is arbitrary and capricious and unenforceable both under the Administrative Procedure Act, 5 U.S.C. § 706 (2), and under the Due Process Clause of the Fifth Amendment.

c. *TECA's selective application of § 212.75 violates this Court's teaching concerning the invalidity of arbitrary and discriminatory classifications.* Ruling 1977-2

Pioneer Boat Line v. Board of Commissioners, 258 U.S. 338, 339-40 (1922).

The government can be expected to argue that retroactive application of the August, 1976, definition should be disregarded because, it will claim, a unit BPCL was required at Hawkins Field as of January 1, 1975, even under the generic standard of "significant alteration in producing patterns" announced in February, 1976. That argument, however, has two fatal flaws. *First*, it also relies upon retroactivity—retroactive application of the generic standard. *Second*, even apart from any question of retroactivity, application of the generic standard involves the resolution of disputed questions of fact. *See, e.g.*, note 15, *supra*. Those questions were not and could not have been decided in this case on summary judgment.

[30] Even if some plausible rational basis could be invented, moreover, none was ever articulated by the agency. Indeed, the agency itself stopped short of calling for retroactive application; retroactivity is a construct of the courts below. In any event, the courts "may not supply a reasoned basis . . . that the agency itself has not given." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

harshly discriminated against the unit at Hawkins Field. According to that Ruling, in August, 1976, when FEA created a valuable benefit for unitized properties in the form of "imputed new oil," it doled out that benefit to pre-existing units in a very strange manner: units formed before February 1, 1976, received the benefit only if they had not experienced a "significant alteration in producing patterns" before that standard was defined on September 1, 1976; but units that had been formed on or after February 1, 1976, received the benefit without regard to whether or when they had experienced a "significant alteration in producing patterns."

Thus, in August, 1976 (although nothing in the regulatory text or preamble suggested it), the agency was allocating the benefit of "imputed new oil" among units on the purely fortuitous basis of when they had been formed in the past. This is no small matter. Approximately one-half of Exxon's liability in this case derives from the denial of "imputed new oil."

There is utterly no rational basis for FEA's discriminatory treatment of units like that at Hawkins Field. It was the responsibility of the agency to "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. at 43. FEA did not do so. The only explanation ever offered by the agency was that units formed on or after February 1, 1976, were uniquely deserving of a grace period—a grace period that, incidentally, resulted in their additionally being entitled to "imputed new oil"—because "§ 212.75 did not, until September 1, 1976, contain a definition of 'significant alteration in producing patterns.'" 42 Fed. Reg. at 4415. That explanation is obvious nonsense. According to FEA, until September 1, 1976, all units, whenever formed, had been subject to the same standard of "significant alteration in producing patterns." *See* 41 Fed. Reg. at 4937, 4941. Thus, all units had been equally subject to the uncertainty caused by the absence of a definition and were equally deserving

of a grace period. If anything, units formed before February 1, 1976, were more deserving, for at the time they were formed the agency had not even articulated the generic standard of "significant alteration in producing patterns," let alone furnished a regulatory definition.

FEA was correct that the absence of a defined standard justified the granting of a grace period. As a matter of law, however, any such grace period had to be made available even-handedly and without favoritism. That is the teaching of this Court. A recent case in point is *Williams v. Vermont*, 105 S. Ct. 2465 (1985). There, this Court struck down a legislative classification that granted a benefit to old residents of a state but denied it to new ones, explaining that "[t]he fact that it may be rational or beneficient to spare some . . . does not mean that the beneficience can be distributed arbitrarily." *Id.* at 2474. It has long been established, moreover, that legislative classifications cannot rest upon an arbitrarily chosen historic date. For example, in *Binney v. Long*, 299 U.S. 280, 294-95 (1936), this Court invalidated a statute, enacted in 1909, that distinguished between conveyances made before, and those made after, September 1, 1907. The improper classification struck down in that case is virtually indistinguishable from the one approved by TECA here.[31]

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[31] TECA and the district court tried to rationalize FEA's discriminatory classification on the ground that it was required by the Energy Policy and Conservation Act ("EPCA"), Pub. L. No. 94-163, 89 Stat. 871. *E.g.*, App. 42a-43a. That plainly is wrong. The relevant provision of the EPCA permitted FEA to reclassify old oil as new oil in order to "give positive incentives for . . . enhanced recovery techniques." 15 U.S.C. § 757(b)(2). That is precisely what FEA did when it granted the benefit of "imputed new oil" to those units formed on or after February 1, 1976, that had experienced a significant alteration in producing patterns but had not implemented enhanced recovery before September 1, 1976. It would have been equally consistent with the EPCA for FEA to have granted the benefit of "imputed new oil" to units, like that at Hawkins Field, which although formed before February 1, 1976, also had not implemented enhanced recovery before September 1, 1976.

A regulatory classification must stand or fall on the rationale furnished by the regulatory agency. *See Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. at 42-43. As we have shown, the rationale furnished by FEA—that units formed on or after February 1, 1976, were uniquely deserving of a grace period—makes no sense. Consequently, the provision for "imputed new oil" should be enforced as it in fact was written and made available prospectively to all units from and after September 1, 1976, no matter when they were formed or when they were required to adopt a unit BPCL.

Indeed, the benefits of "imputed new oil" should be made available retroactively if the harsh new definition contained in § 212.75 itself is to be applied retroactively, as the lower courts have done. A unit required by the new definition to adopt a unit BPCL in January, 1975, should be entitled to "imputed new oil" from January, 1975, to September, 1976, as well as thereafter. This result can be justified not only on the ground that "what is sauce for the goose is sauce for the gander" but also because the provision for "imputed new oil" was intended, in part, to alleviate the harshness of the new definition. *See* 41 Fed. Reg. at 36182. To apply the new definition retroactively, but the provision for "imputed new oil" either prospectively or, as TECA has done, not at all, inordinately magnifies rather than alleviates the new definition's harshness.

3. *TECA not only approved but participated in a violation of the Accardi doctrine.* In Ruling 1977-2, which otherwise represented an extremely severe construction of the agency's regulations, FEA formally ruled that, in mitigation, it would "on a case-by-case basis, permit unit operators to justify the establishment of the date of significant alteration in producing patterns in such units on reasonable bases other than those specified by the present definition." 42 Fed. Reg. at 4415. In this case, that promise proved to be wholly illusory. Al-

though Exxon sought to present its case to the agency, neither FEA nor its successor, DOE, ever made any inquiry into or permitted Exxon to present evidence that would justify the establishment of a reasonable alternative date.

This was a flagrant violation of the doctrine, first expressly articulated in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), that an administrative agency must adhere to its own rules. That doctrine dictates that an agency "must comply, at a minimum, with its own internal procedures," *Morton v. Ruiz*, 415 U.S. 199, 235 (1974), even when those procedures are set forth only in "an internal-operations brochure intended to cover policies that 'do not relate to the public.'" *Id. A fortiori*, the doctrine requires an agency to comply with a procedure that is explicitly designed for the protection and benefit of regulated entities and has been formally announced and published in the *Federal Register*.

The promised case-by-case determination of a reasonable alternative date was an integral part of a larger regulatory package; the agency cannot lawfully insist upon a one-sided enforcement of that package, under which Exxon must rigidly adhere to the letter of Ruling 1977-2 but the agency itself need not. After all, "[i]t is not too exacting to require that [DOE] be a[s] meticulous in obeying its own rules" as it was in "prepar[ing] the groundwork for prosecution." *Yellin v. United States*, 374 U.S. 109, 124 (1963).

The lower courts did not try to cure the agency's violation of the *Accardi* doctrine. Instead, they compounded the wrong. The district court in effect pretended that the problem did not exist, wrongly claiming that "Exxon has never proffered any alternative basis to the agency . . . [and therefore] the question . . . is not before the court." App. 226a n.38.[32] Apparently not wholly

[32] The district court's handling of this issue is beyond understanding. At an earlier stage of the case, when Exxon had moved

satisfied with that result, TECA once again resorted to invention, claiming that "the trial court . . . determined that Exxon had failed to justify another date upon some other 'reasonable basis,' as allowed by Ruling 1977-2." App. 52a.

In "affirming" that purported determination, TECA held, as a matter of law, that there could be no reasonable alternative date because "production across lease lines began in January, 1975." *Id.* at 53a. The court did not explain what this meant and apparently did not recognize that, because Hawkins Field was governed by state MER rules, production allowables were shifting from lease to lease even before unitization. Certainly nothing in Ruling 1977-2 suggests that "production across lease lines" precludes the establishment of a reasonable alternative date. Ruling 1977-2 requires the evaluation of evidence on a case-by-case basis, not the application of arbitrary and preclusive rules. TECA, however, obviously thought that the factual inquiry contemplated by the Ruling would be a waste of time: "any resort to the testimony of expert petroleum engineers for the purpose of determining a reasonable alternative date . . . would be unworkable." *Id.* at 54a-55a. But resort to such testimony or evidence—a routine procedure in both administrative and judicial proceedings—would hardly be "un-

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to dismiss the government's suit so that the question of a reasonable alternative date could be determined first by DOE, the court had assured Exxon that its rights would be preserved:

> Nothing . . . indicates that the DOE will attempt to prevent the defendant from introducing evidence in support of such a date. Indeed, it would appear that any attempt by the DOE to do so would be a violation of the *Accardi* doctrine . . . . [The present suit] merely means that this court, rather than an arm of the agency, will assume the task of making findings of fact and conclusions of law.

App. 333a-334a. When the court later refused to consider the question of a reasonable alternative date, it was "like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard." *Windsor v. McVeigh*, 93 U.S. 274, 277-78 (1876).

workable." When the agency promised to scrutinize the question of a reasonable alternative date on a case-by-case basis, it surely anticipated that it would be asked to consider such evidence. The agency has admitted, furthermore, that Hawkins Field presents the only instance in which the determination of a reasonable alternative date would be necessary under Ruling 1977-2, R. 2241, 2245, 2247, so that the burden of evaluating the evidence and making the determination this one time would hardly be overwhelming.

4. *TECA erroneously construed and applied section 209 of the ESA in a manner that destroys its essential character as an equitable remedy.* Section 209 of the ESA limited Exxon's liability to "restitution of moneys received." There were numerous mitigating factors that the district court and TECA should have taken into account in applying that equitable standard. Just as examples, (1) at a time when national energy policy stressed the importance of increasing the supply of domestic crude oil, Exxon and the other interest owners at Hawkins Field, at a cost of more than $220 million, implemented an enhanced recovery project generating an additional 70 million barrels of oil; (2) the project would not have been undertaken if the agency, in 1974, had announced the legal interpretation that it in fact arrived at only in 1977; (3) in 1974, not only was the law ambiguous, but the agency informally was taking the position that Exxon's construction of the regulations was correct; (4) Exxon kept the agency fully advised of the method by which the regulations were being applied at Hawkins Field; (5) in operating the unit, Exxon made no attempt at gerrymandering to maximize production of new oil but instead adhered to sound conservation practices; (6) Exxon owned only two-thirds of the production at Hawkins Field and actually was the purchaser, not the seller, of most of the rest; (7) the government already has collected from some of the other major interest owners, through settlements between them and DOE; (8) in the absence of unitization and enhanced recovery, a sub-

stantial portion of the field's production would have qualified for the higher new oil price; (9) harshly retroactive and discriminatory application of the regulations denies Exxon the benefit of "imputed new oil" and leaves Exxon far worse off than if enhanced recovery had never been implemented; (10) it has never been determined whether or in what amount consumers were affected (indeed, in the long run they have unambiguously benefited from the increase in oil supplies).[33]

TECA, like the district court, gave these considerations short shrift. Under the guise of remedying "unjust enrichment," TECA took from Exxon that which Exxon in fact never had received. Without making any effort to balance the equities, TECA held Exxon liable for all alleged "overcharges," calculated in a purely mechanical manner, not just on the crude oil owned by Exxon but on all crude oil from Hawkins Field owned and sold or refined by others (including more than $100 million in alleged "overcharges," including interest, committed independently by Exxon's competitor Texaco). That approach squarely conflicts with this Court's teaching concerning the equitable nature of restitution. Because the "cause of action for restitution is . . . equitable in origin and function . . . to prevail [a claimant] must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it." *Atlantic Coast Line Railroad*

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[33] In addition, whether or not this Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), applies retroactively, TECA should have given weight to the fact that the amount of the alleged "overcharges" would have been much less if the House of Representatives had not unconstitutionally vetoed President Ford's order decontrolling crude oil. That order provided for phased decontrol at 3.3 percent per month over a 30-month period, *see* 40 Fed. Reg. 30030, 30035-36 (1975), but was vetoed on July 22, 1975. 121 Cong. Rec. 23,983-84 (1975). TECA cavalierly brushed this history aside, observing that "*Chadha* may not be used by the oil industry to escape the responsibilities owed to the nation and its people as represented by the law and regulations implemented by the DOE and interpreted by this Court." App. 26a.

Co. v. Florida, 295 U.S. 301, 309 (1935). Indeed, "a court of equity . . . guided by equitable doctrines and principles . . . may . . . even withhold relief altogether." *Securities and Exchange Commission v. United States Realty & Improvement Co.*, 310 U.S. 434, 455 (1940).

Here, Exxon has never been "the possessor" of a large portion of the funds that TECA has ordered it to repay. Beyond that, the mitigating circumstances heavily outweigh any wrong that, viewed retrospectively, Exxon may be held to have committed. TECA erroneously failed to exercise the "qualities of mercy and practicality" that constitute "the essence of equity jurisdiction." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). Holding Exxon liable for sales made by the other interest owners, moreover, violated the statutory limitation of liability to "moneys received," a provision that on its face prohibits vicarious liability. At a minimum, TECA should have held Exxon liable only for its own production and should have measured that liability by the amount of new oil reported by Exxon in excess of that which would have been reported in the absence of unitization and enhanced recovery.

TECA further erred in its assessment of prejudgment interest. Without any thoughtful analysis, and on the pretext of depriving Exxon of the benefit of the use of money Exxon in fact had never had and therefore could not have used, the court ordered Exxon to pay prejudgment interest at very high rates—calculated, moreover, on a very dubious basis. *See* note 18, *supra*. This interest was required to be paid to the several States, which had not themselves been deprived of the use of any money. That treatment cannot be squared with this Court's pronouncements concerning prejudgment interest:

> The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable.

Board of County Commissioners v. United States, 308 U.S. 343, 352 (1939). There was no equitable justification in this case for the lower courts' obviously excessive award of prejudgment interest. *See, e.g., Blau v. Lehman*, 368 U.S. 403, 414 (1962); *Rodgers v. United States*, 332 U.S. 371 (1947).

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In this case, Exxon did precisely what national energy policy sought to encourage—at very considerable cost, it produced a very substantial incremental amount of domestic crude oil. When doing so, Exxon tried to follow the pertinent regulations and was completely open and above-board in all its dealings with FEA. The regulations themselves were cryptic, and no one, least of all FEA, knew for sure what they meant.

FEA could not make up its mind how units should be treated. It privately assured Exxon and others that lease-by-lease accounting was permitted, and its adjudicatory body, the Office of Hearings and Appeals, even held that such accounting was required. *See* note 27, *supra*. FEA then went on perhaps the most curious binge of chopping and changing in the annals of regulatory law. When all the dust had cleared, Exxon was left with almost the harshest and most discriminatory set of retroactive rules imaginable—mitigated only by FEA's promise of an opportunity to establish a reasonable alternative on a case-by-case basis.

The courts then applied FEA's retroactive hodgepodge of regulatory prescriptions in an even harsher manner than the agency itself had intended—even giving the regulations a meaning, sharply adverse to Exxon, that FEA expressly had rejected as substantively invalid. DOE and the courts, moreover, broke FEA's promise of case-by-case evaluation of reasonable alternatives; the courts, without even conducting a hearing, left Exxon bereft of the remedy made available by the agency's own rules.

The result of all this manifest unfairness has been the imposition of a staggering and unprecedented liability—an imposition that is without any basis in law and that violates the most central precepts of due process. This Court should grant review to reaffirm, in a highly visible and important case, the primacy of the fundamental rules of administrative law and due process that were consistently flouted by the courts below.

CONCLUSION

The petition for a writ of certiorari should be granted.

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